IN THE

Supreme Court of the United States

October Term, 1964

No. 491

CORLISS LAMONT, doing business as
BASIC PAMPHLETS,

Appellant,

v.

THE POSTMASTER GENERAL OF THE
UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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POINT I

The statute violates the First Amendment.

A. Contrary to the Government's assertion, 39 U. S. C., 4008 "purports to deal directly with speech and the expression of political ideas", *Speiser* v. *Randall*, 357 U. S. 513, 527. *Cf. American Communications Association* v. *Douds*, 339 U. S. 382. Its purpose is to discourage reading matter, the content or sources of which are disapproved by the Government. This is established by a review of the screening program beginning with its administration in 1940, Schwartz and Paul, *Foreign Political Propaganda in the Mails*, 107 U. of Pa. L. Rev. 621, 633-636, and by the statements of the proponents of the legislation, excerpts from which are set forth in Appendix A to this brief.

The statute discourages the reading of such material because of the fear of adverse consequences. Nearly two decades of the loyalty-security programs belie the Government's statement that "[t]here is not the slightest reason to anticipate government reprisal" (Br. p. 21).[1] In Appendix B to this brief, we set forth a sampling of the considerable evidence available that the reading habits of American citizens have long been the subject of governmental inquiry. In fact, the deterrent effect was admitted by Assistant Postmaster General Tyler Abell when he said:

> "First, I would like to correct one minor thing. We don't send postcards. We considered it, but we felt it might be embarassing to some people to have a notice going through the open mail saying, 'You have been getting Communist propaganda addressed to you, do you want it?' And people would object that their postman and their neighbors might possibly see it, so that we do put that in an envelope." Hearings, Subcommittee of the [House] Committee on Appropriations, *Treasury–Post Office Departments and Executive Office Appropriations for 1965: Post Office Department*, 88th Cong. 2d Sess., p. 63.

But, citation on the point is surely unnecessary since this Court will not blind itself to "what all other persons can see and understand", *Child Labor Tax Case*, 259 U. S. 20, 37; *United States* v. *Rumely*, 345 U. S. 41, 44.

Even if the Government were correct in its claim that a request for foreign mail does not "open the doors to identification, publicity or reprisals" (Br., p. 20), the statute would remain a substantial deterrent, for the average American citizen may—not unreasonably—have a sense of danger.[2] The Government's suggestion that the addressee

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[1] "Br." refers to the Government's brief.

[2] *Cf.* "Through the harassment of hearings, investigations, reports, and subpoenas the Government will hold a club over speech and over the press." *United States* v. *Rumely*, 345 U. S. 41, 58, concurring opinion of Mr. Justice Douglas.

has "disclosed his wish to read Communist political propaganda *only momentarily* to the postal official" [italics added] (Br., p. 21) is small comfort, where the so-called momentary disclosure is cumulative.[3]

B. In view of the statute's direct impact upon First Amendment rights, the Government has the burden of showing that the statute has the different purpose and effect claimed for it, *i.e.*, to save money for the Government or to spare the sensibilities of the unwilling addressee. The Government has failed to sustain this burden.

The testimony of Mr. Louis J. Doyle, General Counsel of the Post Office Department, explicitly rejected the claim that the mail was carried "free of charge", *Hearings Before the Committee on Post Office and Civil Service*, U. S. Senate, 87th Cong. 2d Sess. on H. R. 7927, p. 842. International mail is governed by the Convention of the Universal Postal Union which provides that mail, with proper postage paid in the country where mailed, is to be delivered to the addressee by the country of destination. "We obtain in exchange the delivery of our letters and printed matter mail, destined for foreign countries, without paying the foreign postal systems any part of the postage we collect." *Ibid.*

Since the mail from this country is considerably in excess of the mail from the Soviet bloc, "the United States Post Office actually gains under this mutual arrangement, and there is no proper basis for statements that delivery of foreign mail adds to the deficit of the Post Office and increases the need for postal rate increases", *id.* at 850-851.

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[3] The assurances of the Post Office Department that there will be no disclosure of the postcard notices must also be qualified in the light of recent admission that even first class mail has been routinely turned over to another government agency, the Internal Revenue Service. *New York Times*, April 14, 1965, p. 43, col. 8.

In any event, the Post Office has power by statute and regulations to make the adjustments in rates by international agreement or unilaterally so that the financial problem is illusory. See *e.g.* 39 U. S. C. 505.

C. There is no substantial evidence that the sensibilities of unwilling addressees will be affected and that it was the actual reason for the statute. The argument did not move the House Committee on Un-American Activities, to which some such statements were made, and that was not the purpose of the original Cunningham bill which would have proscribed delivery of such propaganda even to *willing* addressees.

This is a far different case from that of *Breard* v. *City of Alexandria*, 341 U. S. 622, where the Court upheld a city ordinance prohibiting door-to-door commercial[4] solicitation. The Government cannot assimilate the facts of this case to the trespass and violation of privacy found in *Breard* by characterizing the mere delivery of mail an "[i]ntrusion into a mailbox" (Br., p. 18).

D. In any event, the statute must fall because a legitimate governmental purpose "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms", *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508, quoting from *NAACP* v. *Alabama*, 377 U. S. 288, 307. This rule was applied in Aptheker despite the claim of a far more substantial governmental interest than is claimed here. *A fortiori*, it applies to the present case, where the Government admits that there is no compelling state interest for the impairment of First Amendment rights (Br., p. 10). As the Court said in *Speiser* v. *Randall*, 357 U. S. 513:

> "The State clearly has no such compelling interest at stake as to justify a short-cut procedure which

[4] But see the dissenting opinion of Mr. Justice Black, joined in by Mr. Justice Douglas, 341 U. S. 622, 645.

must inevitably result in suppressing protected speech." 357 U. S. at 529.

We have already indicated (Appellant's Br., pp. 27-29) two available alternatives less drastic than the instant statute. To this we add the example of Public Law 87-793, Section 307, of October 11, 1962, 76 Stat. 841, relating to obscene matter which was the basis for Congressman Walter's proposal with respect to Communist political propaganda (Appellant's Br., p. 28); the statute is set forth in Appendix C.

In response to our suggestion that existing regulations would permit a single notice by the unwilling addressee which would stop all such mail, 39 CFR 44.1(a) (Appellant's Br., p. 29), the Government states that this would place a burden upon the unwilling addressee. It requires no argument to show that such a burden is negligible in comparison to that imposed upon the willing addressee by the statute and by the new procedure of the Postmaster General.

POINT II

The statute violates the Fifth Amendment.

A. The term "communist political propaganda" is unconstitutionally vague.

The Government is in error in arguing that the constitutional objection of vagueness is limited to criminal or quasi-criminal suits (Br., pp. 24-25). In *Louisiana* v. *United States*, October Term, 1964, No. 67, 85 S. Ct. 817, this Court applied the principle to a civil suit to protect the right to vote. The First Amendment rights here involved are of equal stature.

The argument that the definition of political propaganda in the Foreign Agents Registration Act "has stood for more than 25 years without challenge" (Br., p. 25) does not establish its adequacy. It is much easier to comply

with than to challenge governmental regulatory statutes. The term "political propaganda" is no more comprehensible than the term "communist conspiracy" which has been held to be unduly vague, *O'Connor* v. *United States,* 99 App. D. C. 373, 242 F. 2d 404 (C. A. D. C. 1956). See also *United States* v. *Lattimore,* 94 App. D. C. 268, 215 F. 2d 847 (C. A. D. C. 1954), aff'g in part 112 F. Supp. 507 (D. C. 1953). The statutory definition creates boundaries so far-reaching and confusing as to defy reasonable comprehension.[5]

Statutes may have been upheld despite the possibility of "marginal cases which were not within the legislative intention" (Br., p. 26). But what may be true in an anti-trust case, *United States* v. *National Dairy Corp.,* 372 U. S. 29, is not equally true in the First Amendment area. As the Court pointed out in *Speiser, supra,* the effect of so broad a statute is to preclude the exercise of constitutionally protected rights.

B. The classification of exempt recipients is arbitrary and denies appellant due process.

The Government's brief completely fails to meet the argument that the statutory classifications are arbitrary and unjustifiable (Appellant's Br., pp. 37-38). There is no indication that the general public does not desire the material as much as the exempted group. The average citizen's right is at least equal to, if not greater than, that of governmental agencies, public libraries or graduate schools to receive this material without delay and discouragement and destruction.

The statutory exemption was not based upon a determination that the exempted group had a special right; it was a belated response to a powerful and respectable lobby. The public should not suffer discrimination because it lacks the protection of a people's lobby.[6]

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[5] Our principal brief gave several examples (Appellant's Br., p. 34). It is enough to add the ban upon the *London Economist.*

[6] See Mason, *Brandeis, A Free Man's Life,* 125. *Time Magazine,* Aug. 15, 1955, p. 33.

The Post Office Department appears to have compounded the discrimination by delivering detainable materials to such large-scale commercial enterprises as radio and television stations, newspapers and magazines while requiring ordinary citizens to follow the statutory procedure. (See brief for appellee in No. 848, pp. 5-6.)

POINT III

The statute violates the Fourth and Fifth Amendments.

The Government's claim that unsealed mail may be examined to determine its political content (Br., p. 29) is exactly the view adopted by the District Court in *Esquire* v. *Walker*, 55 F. Supp. 1015, 1018 (D. C. 1944) which upheld the Postmaster General's right to censor second class mail. That decision, however, was reversed, 151 F. 2d 49, *aff'd sub nom. Hannegan* v. *Esquire*, 327 U. S. 146.

The sender of unsealed mail assumes that it will be examined to determine whether it falls within the proper postal category and, therefore, is entitled to the lower rate. See 39 U. S. C. 251 (now 4058). Neither he nor the addressee contemplates that it will be read for content for the purpose of discouraging its delivery.

The Government's suggestion that the addressee's expression of desire to receive communist propaganda "has no conceivable probative value in a criminal prosecution" does not meet the self-incrimination problem. The proper test is whether such evidence might possibly have a tendency to incriminate or might supply a lead to more incriminating evidence. See *Hoffman* v. *United States*, 341 U. S. 479, 488. We have already shown that such reading matter has been used in security hearings and in enforcement of statutes having criminal penalties. See Appendix B.

The Government has failed to respond to appellant's argument based upon the discussion in *Boyd* v. *United States*, 116 U. S. 616, 633 on the interaction between the Fourth and Fifth Amendments, in *Olmstead* v. *United States*, 277 U. S. 438, 478 (dissenting opinion) on the right of privacy, and to the Court's anticipation in *Ex parte Jackson*, 96 U. S. 727, 733 of improper inspection of unsealed mail (Appellant's Br., p. 41).

CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

Respectfully submitted,

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April 22, 1965.

APPENDIX A

Legislative Purpose

In addition to the statements quoted at pages 26 and 27 of appellant's principal brief, the congressional debate contains numerous other frank statements of the purpose of the statute. In the House (on consideration of the original Cunningham amendment) the following statement was made:

Rep. Murray: "This section * * * has the effect of preventing the receipt, handling, transportation or delivery by the United States postal service of any mail determined by the Attorney General to be Communist political propaganda." 108 Cong. Rec. 740.

Rep. Harsha: "I earnestly urge your full support of this effort to stop the delivery of Communist propaganda." 108 Cong. Rec. 746.

Rep. Pelly: "At the outset, let me say that H.R. 7927 as reported by the committee last year contains the so-called Cunningham amendment, which would reinstate the ban against distribution of Communist propaganda from abroad." 108 Cong. Rec. 750.

Rep. Rousselot: "Mr. Chairman, I am especially pleased to see that we have maintained what has become known as the Cunningham anti-Communist literature section of the bill. * * * This anti-Communist mail provision will go a long way in allowing the Post Office Department and the Attorney General to prevent the continued influx of large amounts of Communist literature into this country which in many cases is directed to our youth, various church groups and other fine American segments of our society which do not realize that it is, in effect, poisonous Communist literature." 108 Cong. Rec. 750.

Rep. Derwinski: "However, another aspect of this bill before us deserves as much if not more attention, and that is the Cunningham amendment to prevent the flow of Com-

munist propaganda into the country through the U. S. mails. * * * There is no reason whatsoever why the U. S. mail should be the vehicle for delivery of this Communist propaganda." 108 Cong. Rec. 751.

Rep. Rogers: (after discussing the quantity of printed matter mailed from Communist bloc nations) "I find it comforting, as I am sure the American people are comforted, to see that the committee has exercised its wisdom and made provisions in this bill to control the flow of communistic propaganda." 108 Cong. Rec. 779.

Similar views were expressed in the Senate in connection with the bill as it was finally enacted. Sen. Bush stated, "* * * it is not unreasonable to restrict propaganda of a Communist nature, to the extent, at least, that the people of this country want it restricted." 108 Cong. Rec. 20982.

Rep. Dulsky, a member of the House Post Office Committee which had reported out the original version of the Postal Rate Revision bill, later described §305 as "a monument of progress in combatting Communist political propaganda." Hearings, House Committee on Post Office and Civil Service, *Exclusion of Communist Political Propaganda from the U. S. Mails*, 88th Cong. 1st Sess., June 19 and 20, 1963, page 1.

APPENDIX B

Governmental Interest in the Citizen's Reading Matter

Statistics compiled from *Case Studies in Personnel Security* (Fund for the Republic) are set forth in Brown, *Loyalty and Security*, 489-497. They show that in 13 per cent of cases studied employees were asked about their reading, collection or subscription to literature (*id.*, Table 9, page 492). Eighty-seven out of 377 allegations in 227 security cases were based on reading, subscribing to, or collecting literature (*id.*, Table 21, page 495). The process extended to allegations regarding reading habits even of associates of the suspected employee in 32 of 198 allegations relating to 134 associates (*id.*, Table 27, page 497). An earlier study noted that "Charges of reading Communist literature were issued by eight different departments and occurred in ten out of seventy-five cases." Bontecou, *The Loyalty-Security Program*, 109-110. In one of the few fully-reported cases appears the finding, "The evidence established that Mr. Chasanow did subscribe to a publication known as 'In Fact' some twelve (12) years ago . . . ." *In re Abraham Chasanow* (Dept. of the Navy, 1953) B.N.A. *Gov't Security & Loyalty* 19:527, 528. The finding was part of a report by the Security Hearing Board which found the continued employment of Mr. Chasanow consistent with national security, but which was reversed by the Navy Department Security Appeal Board, *id.*, 19:531.

A further example appears in an Air Force Court Martial trial of an officer accused of various charges including espionage. The accused was required to testify, over his objection, about the presence of Communist literature or books in his brother's library. ACM 18074—Kauffman, 33 C.M.R. 748, reversed in part, without consideration of this question, *United States* v. *Kauffman*, 14 USCMA 283, 34 C.M.R. 63.

Appendix B—Governmental Interest in the Citizen's Reading Matter

The Air Force Board of Review stated, 33 C.M.R. at 796:

> "This evidence of accused's prior exposure to communistic literature and his association with an individual who possessed such literature would go directly to one of the issues in the case and was admissible."

One of the charges in a Coast Guard clearance proceeding was: "During the period of your affiliation with the Communist party you * * * read Communist Party literature and maintained that literature in your possession." *Re: Graham*, Z-390309, Hearing, #2-60, United States Coast Guard, New York, May 17, 1960, Transcript page 4.

The inhibiting effect of these inquiries and charges is obvious, though not susceptible of quantitative analysis. Professor Brown, op. cit. 192, notes that social scientists who have studied the problem "say that federal employees whom they have encountered tend to censor their reading and conversations, and to adopt what they take to be officially prescribed attitudes."

The role of Communist literature is stressed throughout the proceedings in Subversive Activities Control Board proceedings. See Recommended Decision by Kathryn McHale, Board Member, May 18, 1955, in *Brownell* v. *Veterans of the Abraham Lincoln Brigade* (part of the record in *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, now pending before the Court, No. 65, Oct. Term 1964) at 11-15. See also Gellhorn, *Security, Loyalty and Science*, 146-147, 215. The interest of one state investigatory committee in reading matter is documented in Countryman, *Un-American Activities in the State of Washington*, 56, 63, 132, 172(9), 180(5).

APPENDIX C

The Obscenity Statute

Public Law 87-793, § 307, October 11, 1962, 76 Stat. 841, reads as follows:

> In order to alert the recipients of mail and the general public to the fact that large quantities of obscene, lewd, lascivious, and indecent matter are being introduced into this country from abroad and disseminated in the United States by means of the United States mails, the Postmaster General shall publicize such fact (1) by appropriate notices posted in post offices, and (2) by notifying recipients of mail, whenever he deems it appropriate in order to carry out the purposes of this section, that the United States mails may contain such obscene, lewd, lascivious, or indecent matter. Any person may file a written request with his local post office to detain obscene, lewd, lascivious, or indecent matter addressed to him, and the Postmaster General shall detain and dispose of such matter for such period as the request is in effect. The Postmaster General shall permit the return of mail containing obscene, lewd, lascivious, or indecent matter, to local post offices, without cost to the recipient thereof. Nothing in this section shall be deemed to authorize the Postmaster General to open, inspect, or censor any mail except on specific request by the addressee thereof. The Postmaster General is authorized to prescribe such regulations as he may deem appropriate to carry out the purposes of this section.

SUPREME COURT OF THE UNITED STATES

Nos. 491 AND 848.—OCTOBER TERM, 1964.

Corliss Lamont, dba Basic Pamphlets, Appellant, 491 *v.* Postmaster General of the United States.	On Appeal From the United States District Court for the Southern District of New York.
John F. Fixa, Individually and as Postmaster, San Francisco, California, et al., Appellants, 848 *v.* Leif Heilberg.	On Appeal From the United States District Court for the Northern District of California, Southern Division.

[May 24, 1965.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These appeals present the same question: is § 305 (a) of the Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, constitutional as construed and applied? The statute provides in part:

> "Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in

the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." 39 U. S. C. 4008 (a).

The statute defines "communist political propaganda" as political propaganda (as that term is defined in § 1 (j) of the Foreign Agents Registration Act of 1938)[1] which is issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes. 39 U. S. C. § 4008 (b). The statute contains an exemption from its provisions for mail addressed to government agencies and educational institutions, or officials thereof, and for mail sent pursuant to a reciprocal cultural international agreement. 39 U. S. C. § 4008 (c).

To implement the statute the Post Office maintains 10 or 11 screening points through which is routed all unsealed mail from the designated foreign countries. At these points the nonexempt mail is examined by Customs

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[1] "The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." 22 U. S. C. § 611 (j).

authorities. When it is determined that a piece of mail is "communist political propaganda," the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days.

Prior to March 1, 1965, the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future. A list of the persons thus manifesting a desire to receive "communist political propaganda" was maintained by the Post Office. The Government in its brief informs us that the keeping of this list was terminated, effective March 15, 1965. Thus, under the new practice, a notice is sent and must be returned for each individual piece of mail desired. The only standing instruction which it is now possible to leave with the Post Office is *not* to deliver any "communist political propaganda."[2] And the Solicitor General advises us that the Post Office Department "intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently."

No. 491 arose out of the Post Office's detention in 1963 of a copy of the *Peking Review #12* addressed to appellant, Dr. Corliss Lamont, who is engaged in the publishing and distributing of pamphlets. Lamont did not respond to the notice of detention which was sent to him but instead instituted this suit to enjoin enforcement of the statute, alleging that it infringed his rights under the First

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[2] A Post Office regulation permits a patron to refuse delivery of any piece of mail (39 C. F. R. § 44.1 (a)) or to request in writing a withholding from delivery for a period not to exceed two years of specifically described items of certain mail, including "foreign printed matter." *Ibid.* And see Schwartz, The Mail Must Not Go Through, 11 U. C. L. A. L. Rev. 805, 847.

and Fifth Amendments. The Post Office thereupon notified Lamont that it considered his institution of the suit to be an expression of his desire to receive "communist political propaganda" and therefore none of his mail would be detained. Lamont amended his complaint to challenge on constitutional grounds the placement of his name on the list of those desiring to receive "communist political propaganda." The majority of the three-judge District Court nonetheless dismissed the complaint as moot, 229 F. Supp. 913, because Lamont would now receive his mail unimpeded. Insofar as the list was concerned, the majority thought that any legally significant harm to Lamont as a result of being listed was merely a speculative possibility, and so on this score the controversy was not yet ripe for adjudication. Lamont appealed from the dismissal, and we noted probable jurisdiction. 379 U. S. 926.

Like Lamont, appellee Heilberg in No. 848, when his mail was detained, refused to return the reply card and instead filed a complaint in the District Court for an injunction against enforcement of the statute. The Post Office reacted to this complaint in the same manner as it had to Lamont's complaint, but the District Court declined to hold that Heilberg's action was thereby mooted. Instead the District Court reached the merits and unanimously held that the statute was unconstitutional under the First Amendment. 236 F. Supp. 405. The Government appealed and we noted probable jurisdiction. 379 U. S. 997.

There is no longer even a colorable question of mootness in these cases, for the new procedure, as described above, requires the postal authorities to send a separate notice for each item as it is received and the addressee to make a separate request for each item. Under the new system, we are told, there can be no list of persons who have manifested a desire to receive "communist political

propaganda" and whose mail will therefore go through relatively unimpeded. The Government concedes that the changed procedure entirely precludes any claim of mootness and leaves for our consideration the sole question of the constitutionality of the statute.

We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.* returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (dissenting): "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ." [3]

We struck down in *Murdock* v. *Pennsylvania*, 319 U. S. 105, a flat license tax on the exercise of First Amendment rights. A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas* v. *Collins*, 323 U. S. 516. A municipal licensing system for those distributing literature was held invalid in *Lovell* v. *Griffin*, 303 U. S. 444. We recently reviewed in *Harman* v. *Forssenius*, 380 U. S. —, an attempt by a State to impose a burden on the exercise of a right under the Twenty-fourth Amendment. There, a registration was required by all federal electors who did not pay the state poll tax. We stated:

> "For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equiva-

[3] "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." *Pike* v. *Walker*, 121 F. 2d 37, 39. And see Gellhorn, Individual Freedom and Governmental Restraints (1956), p. 88 *et seq.*

lent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*, p. ——.

Here the Congress—expressly restrained by the First Amendment from "abridging" freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell, Thomas,* and *Murdock* cases sought to control the flow of ideas to the public so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage. Nor do we reach the question whether the standard here applied could pass constitutional muster. Nor do we deal with the right of customs to inspect material from abroad for contraband. We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in

sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment. *New York Times Co. v. Sullivan*, 376 U. S. 254, 270.

We reverse the judgment in No. 491 and affirm that in No. 848.

It is so ordered.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

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[May 24, 1965.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE GOLDBERG joins, concurring.

These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights, cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 486, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of foreign government, cf. *Johnson* v. *Eisentrager*, 339 U. S. 763, 781–785. However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it." *Martin* v. *City of Struthers*, 319 U. S. 141, 143. Since the decisions today uphold this contention, I join the Court's opinion.

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497; *NAACP* v. *Alabama*, 357 U. S. 449; *Kent* v. *Dulles*, 357 U. S. 116; *Aptheker* v. *Secretary of State*, 378 U. S. 500. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Even if we were to accept the characterization of this statute as a regulation not intended to control the content of speech, but only incidentally limiting its unfettered exercise, see *Zemel* v. *Rusk*, 381 U. S. —, —, we "have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. The Government's brief expressly disavows any support for this statute "in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry." Rather the Government argues that, since an addressee taking the trouble to return the card can receive the publication named in it, only inconvenience and not an abridgment is involved. But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, *e. g.*, *Freedman* v. *Maryland*, 380 U. S. 51; *Garrison* v. *Louisiana*, 379 U. S. 64; *Speiser* v. *Randall*, 357 U. S. 513. The registration requirement which was struck down in *Thomas* v. *Collins*, 323 U. S. 516, was not appreciably more burdensome.

Moreover, the addressees' failure to return this form results not only in nondelivery of the particular publication but also of all similar publications or material. Thus, although the addressee may be content not to receive the particular publication, and hence does not return the card, the consequence is a denial of access to like publications which he may desire to receive. In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd* v. *United States*, 116 U. S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The Government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C. F. R. § 44.1 (a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; the statute under consideration, on the other hand, impedes delivery even to a will-

ing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. Cf. *Butler* v. *Michigan*, 352 U. S. 380. The argument that the statute is justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda needs little comment. If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights. Cf. *Speiser* v. *Randall*, *supra*. That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the grounds set forth in this concurring opinion.